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TO: Peter Raack, Esq.

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FROM: Russell V. Randle

DATE: July 6, 1995

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July 6, 1995

URGENT LITIGATION MATTER

Via Telecopy

Peter Raack, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: **Carrier Air Conditioning Site, Collierville, TN**

Dear Mr. Raack:

This telecopy letter transmits a copy of a lawsuit and motion for temporary restraining order (TRO) served on Carrier this morning in Memphis by attorneys for the Norfolk and Southern Railroad, which is the landowner adjoining the Collierville site to the north. A hearing occurred this morning in the lawsuit, and a further hearing will occur tomorrow morning in state court in Tennessee. Please make this letter and its attachments a part of the administrative record about this site.

My purpose in transmitting this material to you, as well as my telephone messages to you of this afternoon, and my discussions with your immediate supervisor, Mr. Richard Leahy, Esq., is to provide formal notice to EPA of this lawsuit as may be required by § II. E. of the UAO, and to invoke the force majeure provision of the Unilateral Administrative Order (UAO), § XXII.B. We discussed this further in the conference call with you, me, Carrier's Memphis counsel, Mr. Roscoe Feild, and the Norfolk Southern Railway Company's Memphis counsel, Mr. Gibson. As Mr. Gibson indicated in that call, his client has not checked into the superfund status of the site and what the UAO requires. Nonetheless, a hearing will occur tomorrow which may allow the railroad to place Carrier in violation of the UAO.

As we had discussed earlier this year, Carrier had been approached by the City of Collierville seeking access over Carrier's property for the purpose of unloading gravel and other materials from the railroad siding on Carrier's property. This gravel and other material would be used in major road construction activities south of Carrier's property, specifically the extension of Nonconnah Boulevard. Carrier was agreeable to this arrangement, provided that the City

would provide appropriate indemnities and assure that those operating on the property were properly insured. The provisions of the UAO concerning insurance appear to give Carrier little choice but to insist on such arrangements. UAO, § XXIII, B. That language provides in pertinent part that:

> No later than ten (10) days prior to commencing any Work at the Site pursuant to this Order, Respondent shall secure, and shall maintain until the fifth anniversary of the issuance of the Certificate of Completion under this Order comprehensive general liability and automobile insurance with limits of a least one (1) million dollars, combined single limit. In addition, Respondent shall submit to EPA a certification that its contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property . . . .

The City proved unable to provide any indemnification, as apparently Tennessee law precludes a municipality from so doing. The contractor for the gravel, Hill Brothers Construction, was asked to provide it, but declined. The railroad was asked to provide it, but has so far refused, even after Carrier's Memphis counsel explained that this was a superfund site and told them about the UAO.

As you will see, the railroad has now sued Carrier, contending that railroad's right of way is 50 feet wider than Carrier's title deed and the other title records show. The railroad is seeking a restraining order against Carrier, apparently to prevent Carrier from interfering with the offloading of crushed limestone and with its transport across property Carrier claims under Carrier's deed.

While this dispute would ordinarily be of no interest to EPA, the definition of this site is apparently keyed to Carrier's title deed, not the railroad's claim. Thus, if the railroad prevails tomorrow, and the state court grants it a temporary restraining order, Carrier may be placed in the impossible situation of violating either the UAO or the TRO, as the UAO may be read to require Carrier to insist on certain insurance and indemnification, and to take a number of other steps outlined below, while the TRO apparently being sought by the railroad would forbid Carrier from insisting on compliance with these conditions by the railroad, by Hill Brothers, and by their employees, subcontractors, and so forth. Violation of either of these -- the UAO and the TRO -- will carry the threat of substantial penalties, up to $25,000 per day for the UAO and contempt of court penalties for violations of the TRO. (By contrast, the railroad's gross revenue is $2500 per day.) Under the circumstances, Carrier submits that if the TRO is granted tomorrow, that such grant should serve as an event of force majeure to the extent the TRO's provisions conflict with those of the UAO.

Carrier would suggest that the railroad's application for a TRO is in essence an effort to redraw the boundaries of this superfund site and to revise the terms of a unilateral administrative order issued by EPA. Carrier submits that EPA should vigorously oppose that effort, because it violates section 113(a) of CERCLA.

As you well know, the listing of superfund sites like Collierville on the National Priorities List (NPL) is done pursuant to notice-and-comment rulemaking under section 105. This site was placed on the NPL on February 21, 1990, 55 Fed. Reg. 6154, and is found in 40 C.F.R. Part 330, Appendix B.

Section 113(a) makes the U.S. Court of Appeals for the District of Columbia Circuit the exclusive venue for review of superfund rules, including listings on the NPL like Collierville. Thus, this effort to redraw the boundaries of the site and relieve part of the site of the UAO provisions is brought in the wrong court. It is also untimely. Section 113(a) requires that petitions for review be filed within 90 days of the promulgation of the rule, in this case final listing. Thus, the deadline for review of the site boundaries was May 21, 1990, over five years ago.

The application for a TRO may also be precluded by section 113(h), which forbids preenforcement review of a Unilateral Administrative Order (UAO) except in very specific circumstances. The UAO incorporates a general property description, apparently based on Carrier's deed. By seeking to relieve the railroad of those restrictions in state court, the railroad is evading Congress' clear command that UAOs be reviewable only in federal court, and only in limited circumstances where the United States has initiated an enforcement action. No enforcement action has been brought here because Carrier has been properly performing the UAO and the Statement of Work it commanded. EPA should not allow the railroad to evade this clear statutory command.

Carrier respectfully requests that the EPA Remedial Project Manager (RPM) determine whether it is appropriate to issue a unilateral administrative order to the Norfolk and Southern Railroad, forbidding it from transporting materials across the property EPA has defined as the Collierville site until the railroad complies fully with the insurance, indemnification, notice, and other provisions of the UAO governing this site. In the alternative, Carrier respectfully requests that any grant of the temporary restraining order (TRO) sought by the railroad be treated as an event of force majeure relieving Carrier of conflicting obligations under the February 1993 UAO to Carrier concerning this site.

Our preliminary review of the Carrier UAO suggests that the following requirements may conflict with the temporary restraining order (TRO) being sought by the railroad:

(1) the railroad's unloading plan reportedly calls for significant excavation at the site. The cleanup standard for trichloroethylene (TCE) at this site is 553 parts per billion. Before excavation can occur on the site, testing of the soil is ordinarily required to assure that it is cleaner than the cleanup standards mandate. If, however, the railroad goes forward with its plan, there is no indication that it has any intention of testing the soil appropriately, even though they will be excavating a significant area, up to three feet deep, and we believe as much as several hundred feet long in order to make unloading directly from the railroad cars feasible. Carrier seeks relief from this provision if the railroad obtains the TRO, as it will be impossible for Carrier to control what the railroad is doing on the disputed property, even if Carrier is later found to own it.

(2) The order has a detailed provision concerning off-site shipment of more than ten cubic yards of hazardous substances, which would include soils contaminated at levels higher than the cleanup standard of 553 ppb of TCE. UAO, § VIII.K. These include written notification "prior to any off-site shipment of hazardous substances form the Site to an off-site waste management facility," which may include stockpiling off-site as the railroad apparently contemplates here. The prior written notification must be given both to the remedial project manager and to the appropriate state authorities. Carrier seeks relief from this provision if the railroad obtains the TRO, as Carrier will not be able to control what the railroad is doing, even if Carrier is later found to own the property.

(3) The order contains detailed site access provisions, UAO, § XVIII, requiring Carrier to allow EPA "and its authorized contractors . . . the authority to enter and freely move about all property at the site and off-site areas to which access is required to implement the UAO." As we discussed, the disputed property may include the access road to the City wells, which are a critical portion of the remediation system. In addition, the north remediation area is most easily reached by that access road. Obviously, Carrier will be unable to comply with this access provision of the UAO if the railroad succeeds in obtaining the TRO, even if Carrier is later ruled to own the property the railroad now claims.

(4) The order contains detailed insurance and indemnity provisions, UAO, § XXIII.B., which are at bottom the gist of this dispute, since the railroad refuses to indemnify and it is unclear from our conference call with the railroad's attorney whether the contractor's policy would satisfy the UAO's insurance requirements. Carrier asks to be relieved of these UAO provisions if the TRO is granted insofar as these provisions pertain to the three years of unloading stone contemplated by the railroad for this property.

(5) The order contains requirements for 60 days advance notice to EPA of a change in ownership of the property. To the extent issuance of any TRO conflicts by adjudicating rights to the property contrary to Carrier's deed, Carrier asks to be relieved of this obligation.

(6) The order contains requirements for the reimbursement of EPA response costs. To the extent the railroad's actions here increase EPA's response costs, for example by requiring additional sampling, oversight, monitoring, or legal time, Carrier asks that Carrier be relieved of such response costs and that EPA seek them directly from the Norfolk and Southern Railroad. Moreover, if the railroad succeeds in its effort to obtain title to this portion of the site for this profit-making venture, Carrier asks that EPA seek a proportionate share of response costs from the Norfolk and Southern Railroad, after first crediting Carrier's compliance expenditures on the cleanup against Carrier's proportionate share of obligations at the site. As Carrier has already spent millions of dollars on this cleanup, Carrier expects that the railroad would be responsible for the bulk of EPA's response costs if they succeed in obtaining this property, particularly after they have been repeatedly advised of its status as a superfund site undergoing remediation.

(7) Section XX.A. of the UAO requires Carrier to ensure EPA the right to inspect all documents and information "relating to activities at the site." Carrier will be unable to comply with this provision insofar as the contractor is involved here, unless it separately agrees to comply. Similarly, section XXI concerning record preservation for ten years beyond completion of the remedial work is one Carrier cannot comply with respect to records "relating to the activities at the site" with respect to the railroad and these contractors.

(8) Section XVI.D. of the UAO requires Carrier to assure and certify that contracts concerning the property entered into by other parties, such as the railroad and Hill Brothers Construction Company, contain provisions stating that they will comply with all applicable laws and regulations.

As a review of these provisions indicates, there are many unanswered questions about the railroad's activities, questions which should raise serious concerns for EPA. As we discussed, I will let you know about the outcome of the hearing. Given the short notice, I understand that EPA cannot send anyone to the hearing, but the Agency may wish to exercise its administrative powers with respect to both the railroad and its contractor to assure that there is no interference with the ongoing cleanup work, and no threat to the remediation equipment, monitoring wells, and so forth.

I hope this information is helpful to you. Please call if you have questions or if I can clarify any aspect of this letter.

Sincerely,

Russell V. Randle

Russell V. Randle
Counsel for Carrier Corporation

RVR
Attachment

cc: Ms. Beth Brown
Remedial Project Manager, EPA Region IV

Lorna McClusky, Esq.
Memphis Counsel for Carrier

Ralph T. Gibson, Esq.
Memphis Counsel for Norfolk & Southern Railway Company

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

vs.

No. 105987-2

CARRIER CORPORATION,

Defendant.

FILED
AUG 08 1995
TIME
CLERK

COMPLAINT FOR INJUNCTIVE RELIEF AND MONEY DAMAGES

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS:

1. Plaintiff, Norfolk Southern Railway Company, is a Virginia Corporation authorized to do business in Tennessee.

2. Defendant, Carrier Corporation, is a Delaware Corporation authorized to do business in Tennessee.

3. Pursuant to Acts of Tennessee, 1845-46, Ch. 122, p. 266, Plaintiff's predecessor in interest, the Memphis and Charleston Railroad Company, was given a charter right of way for any lands needed for railroad purposes.

4. The width of the presumptive right of way by charter is 200 feet, 100 feet on either side of track center.

5. On February 26, 1898, the Memphis and Charleston Railroad Company conveyed all of its rights, title and legal interests in its property to Southern Railway Company (now Norfolk Southern Railway Company), including its charter right of way.

6. Defendant owns property adjacent to and within a portion of Plaintiff's charter right of way located in Collierville, Tennessee.

7. A spur track within Plaintiff's right of way crosses Defendant's property.

8. Plaintiff has a contract with a third party, Hill Bros., whereby Plaintiff will transport crushed limestone for Hill Bros. from East Tennessee to Collierville. Contingent upon the agreement is the third party's right to unload the crushed limestone on a portion of the spur track within Plaintiff's right of way. Otherwise, Hill Bros. will use a different carrier.

9. Defendant is under the mistaken belief that Plaintiff's right of way is by

deed which extends for only 50 feet on each side of track center rather than 100 feet. According to Plaintiff's records, however, no such deed exists and the charter presumption controls.

10. The portion of the spur track to be used for unloading is located about 75 feet from track center. Because Defendant believes that portion of the spur track is beyond Plaintiff's right of way, Defendant has demanded licensing fees and indemnity agreements from both Plaintiff and Hill Bros. Defendant has made these demands in writing to both Hill Bros. and Plaintiff.

11. Because the spur track is located on Plaintiff's right of way and the intended use of it is for railroad purposes, however, Defendant has no legal right to demand licensing fees and indemnity agreements from Plaintiff or Hill Bros., and neither wishes to enter into such agreements with Defendant. Hill Bros. is currently using a different carrier unless and until this dispute is resolved in Plaintiff's favor.

COUNT ONE

12. The allegations contained in paragraphs 1 through 11 of the complaint are hereby incorporated by reference into this count one.

13. Defendant has committed the unlawful act of slander of title to Plaintiff's right of way for the following reasons:

(a) Plaintiff owns the charter right of way over the property in question;

(b) Defendant has published false statements about Plaintiff's right of way interest to Hill Bros.;

(c) Defendant has acted maliciously in attempting to extract licensing fees and indemnity agreements from Plaintiff and Hill Bros.; and

(d) Defendant's false statements have caused Plaintiff pecuniary loss and will continue to cause Plaintiff pecuniary loss.

14. If Defendant is allowed to continue slandering Plaintiff's right of way interest, Plaintiff will suffer irreparable harm. Plaintiff is therefore entitled to injunctive relief against Defendant, enjoining Defendant from committing further acts of slander of title to Plaintiff's property interest.

15. Plaintiff is further entitled to damages against Defendant, including

expenses of litigation, for slander of title.

COUNT TWO

16. The allegations contained in paragraphs 1 through 11 of the complaint are hereby incorporated by reference into this count two.

17. Defendant has committed the unlawful act of tortious interference with business relations for the following reasons:

(a) Plaintiff expects to enter into a business relationship with Hill Bros.;

(b) Defendant has knowledge of the expected business relationship between Hill Bros. and Plaintiff;

(c) Defendant is intentionally interfering with the expected relationship between Hill Bros. and Plaintiff; and

(d) Defendant's interference has caused harm and damage to Plaintiff and will cause harm and damage to Plaintiff in the future if such interference continues;

18. Plaintiff is entitled to injunctive relief against Defendant from continuing to interfere with Plaintiff's business relationship with Hill Bros.

19. Defendant is liable to Plaintiff for damages to Plaintiff, including litigation expenses, for Defendant's interference with the business relationship between Plaintiff and Hill Bros.

WHEREFORE, Plaintiff prays that:

1. The Court enter a temporary restraining order and a temporary injunction enjoining Defendant from further slandering Plaintiff's property interest in the property in question and interfering with the business relationship between Plaintiff and Hill Bros. pending a full hearing on the matter;

2. After a full hearing, the Court permanently enjoin Defendant from slandering Plaintiff's title to the property in question and interfering with the business relationship between Plaintiff and Defendant;

3. The Court award Plaintiff its damages, including litigation expenses, against Defendant for the harm Plaintiff has suffered from Defendant's acts of slander of Plaintiff's title

and tortious interference with business relations;

4. The Court grant Plaintiff such additional relief to which it is entitled.

EVERETT B. GIBSON LAW FIRM
950 Morgan Keegan Tower
50 North Front Street
Memphis, Tennessee 38103
(901) 576-8211

By: Ralph T. Gibson
Ralph T. Gibson

VERIFICATION

G. H. Mercier, after first being duly sworn, states that she has read the complaint and the facts stated in the complaint are true and correct to the best of her knowledge and belief.

G. H. Mercier
Agent Terminal Control and Train Master for Norfolk Southern Railway Company

Sworn to and subscribed before me this 6th day of July, 1995.

Notary Public

My commission expires: February 23, 1999

TEMPORARY RESTRAINING ORDER

Upon Plaintiff's posting of a bond in the amount of _____, Defendant is hereby enjoined from committing any of the acts of slander of title or tortious interference with business relations alleged in the complaint pending a full hearing on the matter.

Chancellor

Dated: _____

FIAT

TO THE CLERK AND MASTER:

Upon Plaintiff's posting of bond in the amount of _____, issue the foregoing temporary restraining order and set a full hearing on the matter for the ____ day of _____, 1995.

_____
Chancellor

Dated: _____